

Intergovernmental relations, Reporting and recordkeeping requirements.

Authority: This document is issued under the authority of section 9004 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6991c.

Dated: September 20, 2006.

Robert W. Varney,

Regional Administrator, EPA Region I.

[FR Doc. E6-16375 Filed 10-3-06; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 302 and 355

[EPA-HQ-SFUND-2003-0022; FRL-8227-7]

RIN 2050-AF02

Administrative Reporting Exemption for Certain Air Releases of NO_x (NO and NO₂)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency is issuing a final rule that will reduce reporting burdens under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, and the Emergency Planning and Community Right-to-Know Act, also known as Title III of the Superfund Amendments and Reauthorization Act.

In this rule, EPA broadens the existing reporting exemptions for releases that

are the result of combustion of less than 1,000 pounds of nitrogen oxide and less than 1,000 pounds of nitrogen dioxide to the air in 24 hours. These may also include emissions from detonation or processes that include both combustion and non-combustion operations, such as nitric acid production. This administrative reporting exemption is protective of human health and the environment and consistent with the Agency's goal to reduce unnecessary reports given that the levels for which the Clean Air Act regulates nitrogen oxides are considerably higher than 10 pounds. In addition, the Agency believes that the information gained through submission of the reports for those exempted releases would not contribute significantly to the data that are already available through the permitting process to the government and the public.

DATES: This final rule is effective on November 3, 2006.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-HQ-SFUND-2003-0022. All documents in the docket are listed on the www.regulations.gov Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through

www.regulations.gov or in hard copy at the Superfund Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Superfund Docket is (202) 566-0276.

Note: The EPA Docket Center suffered damage due to flooding during the last week of June 2006. The Docket Center is continuing to operate. However, during the cleanup, there will be temporary changes to Docket Center telephone numbers, addresses, and hours of operation for people who wish to visit the Public Reading Room to view documents. Consult EPA's **Federal Register** notice at 71 FR 38147 (July 5, 2006) or the EPA Web site at www.epa.gov/epahome/dockets.htm for current information on docket status, locations and telephone numbers.

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SUPPLEMENTARY INFORMATION:

A. Does This Action Apply to Me?

Type of entity	Examples of affected entities
Industry	Application of this rule should result in a reduction to your reporting burden—persons in charge of vessels or facilities that may release nitrogen oxide (NO) or nitrogen dioxide (NO ₂) or both (NO _x) to the air that is the result of combustion and combustion-related activities.
State, Local, or Tribal Governments	State and Tribal Emergency Response Commissions, and Local Emergency Planning Committees.
Federal Government	National Response Center and any Federal agency that may release NO _x .

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the criteria in section I.C of this final rule preamble and the applicability criteria in § 302.6 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person

listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Outline of This Preamble

The contents of this preamble are listed in the following outline:

- I. Introduction
 - A. What is the Statutory Authority for this Rulemaking?
 - B. What is the Background For this Rulemaking?
 - C. Which NO and NO₂ Releases Are Administratively Exempt From the Reporting Requirements?
 - D. What Are the Changes From the Proposed Rule?
- II. Response to Comments
 - A. Support for Proposed Reporting Exemptions

- B. Support for Expanding Continuous Release Reporting in Addition to Proposed Exemption
 - 1. Simplify Continuous Release Initial Release Notification
 - 2. Clarify Continuous Release Reporting Requirements
- C. Support to Increase Level of the Exemption
 - 1. Support a Number Larger than 1,000 Pounds
 - 2. Increase RQ for Combustion-Related Exemption to 5,000 Pounds
 - 3. Raise or Eliminate the 1,000 Pound Reporting Threshold for all Combustion-Related Releases
- D. Request That the Administrative Reporting Exemption Not Include the Qualifier "Accidents and Malfunctions"
 - 1. Accidents and Malfunctions

2. Also Include in Exemptions—Start-ups, Shut-downs, and Up-sets
 3. Clarify that Flares are Control Devices—Not Considered Accidents and Malfunctions
 - E. Requests That the Administrative Reporting Exemption Include Combustion and Non-Combustion Processes
 - F. Interpretation of CERCLA Provisions
 1. Proposed Exemption only Applies to Emissions Not Considered Federally Permitted
 2. Clarify that NO_x Represents NO and NO₂ Interchangeably
 - G. Issues Related to Rulemaking Procedure
- III. Regulatory Analysis
- A. Executive Order 12866: Regulatory Planning and Review
 - B. Paperwork Reduction Act
 - C. Regulatory Flexibility Act
 - D. Unfunded Mandates Reform Act
 - E. Executive Order 13132: Federalism
 - F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
 - G. Executive Order 13045: Protection of Children From Environmental Risks and Safety Risks
 - H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use
 - I. National Technology Transfer and Advancement Act of 1995
 - J. Congressional Review Act

I. Introduction

A. What Is the Statutory Authority for This Rulemaking?

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, as amended by the Superfund Amendments and Reauthorization Act of 1986, gives the Federal government broad authority to respond to releases or threats of releases of hazardous substances from vessels and facilities. The term “hazardous substance” is defined in section 101(14) of CERCLA primarily by reference to other Federal environmental statutes.¹ Section 102 of CERCLA gives the U.S. Environmental Protection Agency (EPA) authority to designate additional hazardous substances. Currently there are 764 CERCLA hazardous substances,² exclusive of Radionuclides, F-, K-, and Unlisted Characteristic Hazardous Wastes.

Under CERCLA section 103(a), the person in charge of a vessel or facility from which a CERCLA hazardous substance has been released in a quantity that equals or exceeds its

reportable quantity (RQ) must immediately notify the National Response Center (NRC) of the release. A release is reportable if an RQ or more is released within a 24-hour period (see 40 CFR 302.6). This reporting requirement, among other things, serves as a trigger for informing the Federal government of a release so that Federal personnel can evaluate the need for a Federal removal or remedial action and undertake any necessary action in a timely fashion.

On March 19, 1998, the Agency issued a final rule (see 63 FR 13459) that broadened the existing reporting exemptions for releases of naturally occurring radionuclides. The Agency relied on CERCLA sections 102(a), 103, and 115 (the general rulemaking authority under CERCLA) as authority to issue regulations governing section 103 reporting requirements, as well as administrative reporting exemptions. These exemptions were granted for releases of hazardous substances that pose little or no risk or to which a Federal response is infeasible or inappropriate (see 63 FR 13461).

In addition to the reporting requirements established pursuant to CERCLA section 103, section 304 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. 11001 *et seq.*, requires the owner or operator of certain facilities to immediately report releases of CERCLA hazardous substances or any extremely hazardous substances³ to State and local authorities (see 40 CFR 355.40).

This rule that applies to CERCLA section 103 notification requirements also applies to EPCRA section 304 notification requirements. In part, EPCRA’s reporting requirement is designed to effectuate a statutory purpose of informing communities and the public generally about releases from nearby facilities. Notification is to be given to the community emergency coordinator for each Local Emergency Planning Committee (LEPC) for any area likely to be affected by the release, and the State Emergency Response Commission (SERC) of any State likely to be affected by the release. Through this notification, State and local officials can assess whether a response to the release is appropriate, regardless of whether the Federal government intends to respond. EPCRA section 304 notification requirements apply only to

releases that have the potential for off-site exposure and that are from facilities that produce, use, or store a “hazardous chemical,” as defined by regulations promulgated under the Occupational Safety and Health Act of 1970 (29 CFR 1910.1200(c)) and by section 311 of EPCRA.

B. What Is the Background for This Rulemaking?

On December 21, 1999, EPA published interim guidance on the Federally permitted release exemption to section 103 of CERCLA and section 304 of EPCRA (see 64 FR 71614). The interim guidance discussed EPA’s interpretation of the Federally permitted release exemption as it applies to some air emissions and solicited public comment. The public comment period closed, after several extensions, on April 10, 2000. The Agency received many comments on the interim guidance, including specific questions regarding EPA’s interpretation of the Federally permitted release exemption as it applies to NO_x releases. NO_x releases to air are somewhat unique in that, in most cases, Federally enforceable permits (including State issued through delegated programs) are not issued to facilities that release NO_x below a certain threshold. NO_x emissions from these sources are minimal and may not pose a hazard to health or the environment. In its final Guidance on the CERCLA Section 101(10)(H) Federally Permitted Release Definition for Certain Air Emissions (67 FR 18899, April 17, 2002), EPA responded to the concern that many small facilities do not have Federally enforceable permits by stating in that **Federal Register** notice that it recognized, “that certain uncontrolled air emissions of nitrogen oxide (NO) and nitrogen dioxide (NO₂) equal to or greater than the ten pound RQ may rarely require a government response.” (See 67 FR 18904.) When the Agency published that final Guidance, it also extended and expanded an on-going enforcement discretion (Appendix B to that Notice) policy⁴ with regard to owners, operators or persons in charge of facilities or vessels for failure to report air releases of NO and NO₂ that would otherwise trigger a reporting obligation under CERCLA section 103 and EPCRA section 304, unless such releases are the result of an accident or malfunction. (See 67 FR 18904.)

¹ Other Federal environmental statutes include: Federal Water Pollution Control Act (sections 1321(b)(2)(A), 1317(a)), Solid Waste Disposal Act (section 6921), Clean Air Act (section 7412), and Toxic Substances Control Act (section 2606).

² This total includes the P- and U-listed wastes under Subtitle C of the hazardous waste regulations.

³ Extremely hazardous substances are those listed in Appendix A and B of 40 CFR part 355. EPCRA section 11002(a)(2) required the Agency to publish a list of extremely hazardous substances that is the same list as the list of substances published in November 1985 by EPA in Appendix A of the “Chemical Emergency Preparedness Program Interim Guidance.”

⁴ The enforcement discretion policy was initially announced in a memorandum to EPA Regional Counsels and Division Directors for EPCRA section 304/CERCLA section 103 from Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, dated February 15, 2000.

Since the publication of the Guidance, there has been significant interest and inquiry by industry for the Agency to address the reporting obligations for NO_x releases to air under CERCLA and EPCRA. Most recently, the Office of Management and Budget (OMB) asked the public for their suggested reforms to rules, guidance documents, or paperwork requirements that would reduce unnecessary costs, increase effectiveness, reduce uncertainty, and increase flexibility. In OMB's report to Congress on the costs and benefits to Federal regulation (the "Thompson Report"), one of the nominated reforms meriting priority consideration by EPA was to grant some form of reporting relief for certain releases of NO_x to air. As a result, on October 4, 2005, EPA published a proposed rule (see 70 FR 57813) that provided notice of, and requested comments, including any relevant data, on a proposed new administrative reporting exemption from certain notification requirements under CERCLA and EPCRA. The Agency also sought public comment on human health risk assessment data or other relevant data that related to the proposal. The proposed administrative reporting exemption pertained to releases of less than 1,000 pounds of nitrogen oxide and nitrogen dioxide (or collectively referred to as "NO_x" for the proposed rule) to the air in 24 hours that is the result of combustion activities, unless such release is the result of an accident or malfunction. The proposed rule included a requirement that notifications must still be made for accidents or malfunctions that result in the releases of NO_x at the final RQ of 10 pounds or more per 24 hours. The Agency also sought comment on two other options to address the high frequency of release notifications. Those options involved more efficient use of Continuous Release reporting and a complete exemption from the notification requirements under CERCLA and EPCRA.

Twenty-seven comment letters, totaling more than 150 pages, were received on the proposed rule. Of the 27 comment letters, 14 were received from trade organizations, five from power corporations, five from chemical companies, two from organizations representing chemical companies, and one from a not-for-profit organization. This final rule was developed following careful consideration of all issues and concerns raised in public comments. Upon the effective date of this final rule, the Agency is withdrawing the existing enforcement discretion policy, described above, for failure to report air

releases of NO and NO₂ that would otherwise trigger a reporting obligation under CERCLA section 103 and EPCRA section 304.

C. Which NO and NO₂ Releases Are Administratively Exempt From the Reporting Requirements?

In this final rule, releases of NO to the air that are the result of combustion and combustion-related activities that are less than 1,000 pounds per 24 hours, and releases of NO₂ to the air that are the result of combustion and combustion-related activities that are less than 1,000 pounds per 24 hours, are administratively exempt from the reporting requirements of CERCLA and EPCRA, established in 40 CFR 302.6 and 40 CFR 355.40, respectively. Some examples of combustion-related activities that are intended to be included in this exemption are emissions from blasting or detonation at construction or mining sites and those NO_x emissions from nitric acid plants.

The existing RQ for both NO and NO₂ is 10 pounds in any 24 hour period. This RQ is easily met by those facilities that release NO_x⁵ to the air. This is especially true when the facility processes include combustion and combustion-related activities. For example, an 80 million BTU/hr natural gas boiler will exceed the RQ for NO_x after 2.5 hours of operation. A 120 million BTU/hr coal boiler will exceed the RQ for NO₂ in less than 3 hours of operation and the RQ for NO in less than 2 hours of operation. Small engines also trigger the 10 pound threshold—an 18 horsepower engine running 24 hours will exceed the RQ for NO_x and a 100 horsepower engine will exceed the RQ for NO_x in five hours. Even turning on bakery ovens could trigger the RQ for NO_x when turned on for daily operations.⁶

The exemptions apply only to CERCLA section 103 and EPCRA section 304 reporting requirements and do not apply to the related response and liability provisions. EPA is promulgating the administrative reporting exemption at 1,000 pounds for

⁵ For shorthand purposes only, we use the convention NO_x to refer to both NO and NO₂ either collectively or as individual hazardous substances. However, where regulatory clarity is needed, we will specifically refer to each hazardous substance.

⁶ These examples were submitted to the Agency during the comment period for the *Guidance on the CERCLA Section 101(10)(H) Federally Permitted Release Definition for Certain Air Emissions* (see 67 FR 18899, April 17, 2002) discussed further in the Background section of this preamble. A sample of the letters received related to NO_x and its 10 pound RQ are provided in the Docket for today's final rule (SFUND-2003-0022). All of the letters received pursuant to the Guidance can be found in that Docket (GE-G-1999-029).

24-hours, based on our review of the comments, for three principal reasons. First, the 1,000 pound level represents a 100-fold increase from the regulatory RQ of 10-pounds. This level was one of three (100, 1000, and 5000 pounds) levels suggested by two organizations representing regulated industries⁷ as a level for the Agency to raise the RQ for NO and NO₂. Second, the Agency sought public comment on human health risk assessment data or other relevant data that related to its proposed rule, including an alternative for a complete exemption from the notification requirements under CERCLA and EPCRA. Although the Agency received considerable comment, including two specific examples generated from a USEPA screening model that support the desire to (1) raise the administrative exemption to 5,000 pounds or higher or (2) completely exempt NO and NO₂ from CERCLA and EPCRA reporting requirements, the Agency did not receive risk assessment data that would support a different level for the administrative reporting exemption. The Agency also did not receive any human health risk assessment data that would oppose the administrative reporting exemption at the proposed level. Third, EPA believes that a CERCLA response to the release otherwise reportable would be very unlikely and possibly infeasible or inappropriate, because (1) the releases are generally at levels below those that are regulated under the Clean Air Act (CAA), and (2) the Agency has generally not responded to such releases. As a result, the administrative reporting exemptions are intended to allow EPA to focus its resources on the more serious releases and to protect public health and welfare and the environment more effectively and efficiently. At the same time, the exemptions will significantly eliminate unnecessary reporting burdens on persons-in-charge of facilities and vessels that release NO_x during combustion and combustion-related activities.

D. What Are the Changes From the Proposed Rule?

In response to comments, EPA has made one change and clarified a few of the provisions included in the October 4, 2005, proposed rule. Specifically, EPA decided to remove the qualifier to the exemption for releases that are the "result of accidents and malfunctions." As discussed in more detail in Sections

⁷ The organizations were the National Association of Manufacturers (NAM) and the American Chemistry Council (ACC). The ACC also provided comment to the proposed rule.

II. D.1–3 of this preamble, information submitted by public commenters and assembled by the Agency in response to comments are sufficient to support a finding that the qualifier adds unnecessary confusion that may lead to additional burden and unnecessary reporting. This final rule includes a better explanation as to what is covered under combustion, and clarifies that combustion-related activities (where they cannot be realistically separated) are included within the administrative reporting exemption and that NO_x represents NO and NO₂ interchangeably. See Section II.E. and Section II.F.2, respectively.

II. Response to Comments

EPA's full response to public comments related to this rule are contained in "Responses to Comments on the October 4, 2005 Notice of Proposed Rulemaking on Administrative Reporting Exemptions for Certain Air Releases of NO_x (NO and NO₂)" (Responses to Comments), which is available for inspection at the location described in ADDRESSES, above. The following sections provide a summary of the major public comments and EPA's responses.

A. Support for Proposed Reporting Exemptions

All of the 27 comment letters submitted on the October 4, 2005 proposed rule supported to some extent the Agency's effort to reduce reporting burden for releases of NO and NO₂ (NO_x). Of those, 10 specifically supported the proposed administrative reporting exemption at 1,000 pounds.

B. Support for Expanding Continuous Release Reporting in Addition to Proposed Exemption

Seven commenters supported this alternative that would expand continuous release reporting to require that NO_x release notifications be covered under the continuous release reporting scheme. However, those who supported this alternative generally believed that it should be in addition to rather than instead of the administrative reporting exemption. On the other hand, four commenters opposed this alternative primarily because it would be in lieu of the proposed exemption, and would not afford practicable relief.

1. Simplify Continuous Release Initial Release Notification

While commenters both supported and opposed the use of the continuous release reporting mechanism, they all expressed the same concern—that is, the Agency would promulgate the

continuous release reporting mechanism in place of the administrative reporting exemption. In this final rule, both the administrative reporting exemption and the continuous release reporting mechanism, as discussed below, can be used to reduce burden.

For those commenters who expressed support for simplifying the continuous release initial release notifications, they argued that EPA must broaden its concepts of "continuous" and "stable in quantity and rate" so as to encompass startup and shutdown operations. EPA believes that in certain instances startup and shutdown operations may meet the definitions of *continuous and stable in quantity and rate*. The definition of *continuous* under 40 CFR 302.8 says that, "a continuous release is a release that occurs without interruption or abatement or that is routine, anticipated, and intermittent and incidental to normal operations or treatment processes." The definition of *stable in quantity and rate* under 40 CFR 302.8 says that, "a release that is stable in quantity and rate is a release that is predictable and regular in amount and rate of emission." The regulation puts the burden on the person in charge of a facility or vessel to establish a sound basis for qualifying the release for continuous release reporting (see 40 CFR 302.8(d)) and allows that establishment to be made using release data, engineering estimates, knowledge of operating procedures, best professional judgment, or reporting to the NRC for a period sufficient to establish the continuity and stability of the release. Therefore, we believe that the existing rules already provide, in certain instances, for the use of continuous release reporting. To the extent that EPA believes it appropriate to broaden the definition of "continuous" and "stable in quantity and rate," we believe such revision should apply more broadly to all hazardous substances and extremely hazardous substances and would require further rulemaking.

2. Clarify Continuous Release Reporting Requirements

One of the commenters requested that EPA clarify that the exemption also applies to continuous release reporting requirements. The Agency agrees that the administrative reporting exemption for releases of NO and NO₂ would also apply to continuous releases.

C. Support To Increase Level of the Exemption

Eighteen commenters supported this alternative to increase the level of the exemption. In general, five of those

commenters supported some number larger than 1,000 pounds, ten commenters supported increasing the combustion-related exemption to 5,000 pounds, and three commenters supported eliminating the 1,000 pound reporting threshold altogether for all combustion-related releases.

1. Support a Number Larger than 1,000 Pounds

Some of the commenters who supported a number larger than 1,000 pounds also proposed another level. One commenter suggested increasing the exemption to a 1,500 pound level arguing that those releases would also be below the 250 tons per year (TPY) that EPA cites in the NPRM. EPA has adopted the RQ levels of 1, 10, 100, 1000, and 5000 pounds originally established pursuant to CWA section 311 (see 40 CFR Part 117). The Agency adopted the CWA five-level system primarily because (1) it has been successfully used pursuant to the CWA, (2) the regulated community is already familiar with these five levels, and (3) it provides a relatively high degree of discrimination among the potential hazards posed by different CERCLA hazardous substances. (See 50 FR 13456, 13465, April 4, 1985.) Therefore, the Agency has decided not to promulgate an administrative reporting exemption level that is inconsistent with its long-established RQ levels.

One commenter suggested that EPA identify additional sources of NO_x emissions to further reduce the notification burden. At this time, EPA is not considering extending the administrative reporting exemption to specific sources. However, EPA wishes to clarify that the release of NO_x during the activity of explosive detonation associated with blasting of hard rock in quarries is, for the purposes of this final rule, a release of NO_x that is the result of combustion and thus, eligible for the administrative reporting exemption promulgated today.

2. Increase RQ for Combustion-Related Exemption to 5,000 Pounds

One of the commenters who supported increasing the combustion-related exemption to 5,000 pounds also believes that EPA should change the basic reportable quantity from 10 pounds. EPA disagrees. Changing the basic reportable quantity (RQ) from 10 pounds to a "reasonable" figure, which the commenter considers to be 5,000 pounds, would be contrary to EPA's long established principle of maintaining one RQ that applies to all media. The RQ for NO and NO₂ was adjusted in the final rule published

April 4, 1985. (See 50 FR 13456.) The RQ for both hazardous substances was adjusted from their statutory RQ to the current 10 pound RQ for each.

3. Raise or Eliminate the 1,000 Pound Reporting Threshold for all Combustion-Related Releases

Three commenters expressly supported eliminating the 1,000 pound reporting threshold for all combustion-related releases. While the Agency acknowledges the commenters' position, we did not receive adequate information (for example, human health and ecological risk assessment) to support extending the administrative reporting exemption beyond the proposed 1,000 pound level.

One commenter⁸ used a USEPA air dispersion model to illustrate the impact of an incremental 5,000 pounds of emissions from actual boiler and gas turbine operations to support the position that the administrative reporting exemption should be raised to 5,000 pounds. The commenter provided two examples of NO₂ emissions (NO quickly reacts to NO₂ after release from a combustion stack) and the resulting hourly concentrations (micrograms/meter³) that illustrate concentration levels that are much less than the California acute reference exposure level (REL) for NO₂.⁹ EPA does not consider the risk information addressing these two examples to be sufficient for the requested human health and ecological risk assessments because, (1) commenters were informed in the proposed rule where to obtain guidance on conducting human health and ecological risk assessments,¹⁰ including addressing all current complete site-specific exposure pathways for all affected media, future land use potential, potential exposure pathways, and toxicity information and (2) the example emission scenarios are too narrow given the broader potential release scenarios that this administrative reporting exemption is seeking to include. In addition, releases of NO_x to the environment cause a wide variety of health and environmental impacts that is not addressed by the California REL. For example, ground-level ozone is formed when NO_x and volatile organic compounds (VOCs) react in the presence of sunlight; acid

rain is formed when NO_x and sulfur dioxide react with other substances in the air to form acids; and NO_x reacts readily with common organic compounds to form a wide variety of toxic products. Therefore, the Agency believes that the information provided, while informative, is not sufficient to further increase the administrative reporting exemption.

D. Request That the Administrative Reporting Exemption Not Include the Qualifier "Accidents and Malfunctions"

Twenty-five commenters requested that the administrative reporting exemption not include the qualifier for "accidents and malfunctions." Of those 25 commenters, 16 commented specifically on accidents and malfunctions, three commenters requested that EPA also include start-ups, shut-downs, and up-sets, and five sought clarification that flares are control devices and therefore not considered the result of accidents and malfunctions.

1. Accidents and Malfunctions

The Agency received considerable support for either extending the administrative reporting exemption to releases resulting from accidents and malfunctions or limiting the scope of the administrative reporting exemption to combustion devices (eliminating the need to identify accidents and malfunctions), or both. Several commenters were correct in pointing out that no NO_x releases from combustion devices—including many related to accidents and malfunctions—has required any Federal response. In fact, the NO_x release notifications that have required response actions have only been in the category of releases not related to combustion devices, such as in situations where NO_x was released incidental to the actual reason for the response (*i.e.*, fires and explosions). Some commenters argued that the "accidents and malfunctions" qualifier would result in minimal burden reduction, if not an increase in burden. The historical data that the Agency used to predict future releases is populated with release information that was not covered by the enforcement discretion in place since February 15, 2000, essentially releases that were due to "accidents and malfunctions." If the administrative reporting exemption retains the "accident and malfunction" qualifier, then the Agency could receive notification of releases at 1,000 pounds and above that were not reported due to the enforcement discretion in addition to the notifications anticipated based on the historical notification data. This

would be inconsistent with the intent of the rulemaking to offer burden reduction.

CERCLA section 103 and EPCRA section 304 notification requirements require the person in charge of the facility or vessel that released the hazardous substance to make the notification to Federal, State, and local authorities. Neither statute nor their implementing regulations differentiate the cause of the release (*i.e.*, whether the release was the result of an accident or malfunction). EPA agrees with the commenters that to require a separate assessment as to whether the release was the result of an accident or malfunction, particularly with respect to releases that result from combustion, may be overly burdensome and not consistent with the intention of either statute, nor the Agency's goal of reducing burden. If a response is not necessary for a release of NO_x from a facility due to normal operations, that assessment should apply even if an accident or malfunction somehow generated the release. EPA also agrees that, particularly with respect to certain combustion activities, it may be a challenge, if not impossible, to determine whether the combustion activities were caused by an accident or malfunction. Thus, protective, over-reporting could result.

A few of the commenters pointed out that EPA has not defined the terms, "accident" and "malfunction" and insist that EPA will need to ensure that any interpretation of what is considered within an "accident" or "malfunction" event is consistent with interpretations in other EPA programs (*e.g.*, air permitting). EPA agrees that inconsistency with other EPA programs has the potential to create unnecessary confusion. Therefore, the definition and interpretation of those terms should remain within the EPA programs where they have a direct regulatory application. The Agency is also not providing a definition of "excess emissions" because it is no longer necessary without the "accident and malfunction" qualifier.

Therefore, EPA will not include the qualifier, "unless such release is the result of an accident or malfunction" to the administrative reporting exemption for releases of NO or NO₂, or both, to air that are the result of combustion or combustion-related activities.

2. Also Include in Exemptions—Start-ups, Shut-downs, and Up-sets

Three commenters requested that the Agency expand the exemption to include additional emissions from combustion sources, such as start-ups,

⁸ This commenter's position was endorsed and supported by reference in several other comment letters.

⁹ The NO₂ REL of 470 micrograms per cubic meter is a one-hour risk-based number based on respiratory/asthma problems.

¹⁰ See, 70 FR 57819, October 4, 2005. Guidance can be found at: http://www.epa.gov/oswer/riskassessment/superfund_toxicity.htm.

shut-downs, and upsets. For the reasons described in Section II.D.1 above, EPA will not include the qualifier, “unless such release is the result of an accident or malfunction” to the administrative reporting exemption for releases of NO or NO₂, or both, to air that are the result of combustion or combustion-related activities. To the extent that start-up, shut-down, and up-sets are part of a combustion or combustion-related activity, they are eligible for the administrative reporting exemption, provided such releases are below the 1,000 pound level per 24-hours.

3. Clarify That Flares Are Control Devices—Not Considered Accidents and Malfunctions

Five commenters requested that the Agency clarify that flares are control devices and not considered the result of an accident or malfunction. For the reasons described in Section II.D.1 above, EPA will not include the qualifier, “unless such release is the result of an accident or malfunction” to the administrative reporting exemption for releases of NO or NO₂, or both, to air that are the result of combustion or combustion-related activities. To the extent that flaring is combustion or a combustion-related activity, it is considered within this administrative reporting exemption, provided such releases are below the 1,000 pound level per 24-hours.

E. Requests That the Administrative Reporting Exemption Include Combustion and Non-Combustion Processes

The Agency received three requests to expand the exemption to include combustion processes that also include non-combustion activities and non-combustion processes. One of those comments specifically identified NO_x emissions from nitric acid plants during the production of fertilizer. The commenter described the process of NO_x emissions from nitric acid plants. The process begins with mixing ammonia with air that is combusted across a platinum/rhodium catalyst creating a hot NO_x gas, primarily NO. The hot NO_x gas is cooled through a series of heat exchangers and most of the NO reacts with the excess oxygen to form NO₂. The NO_x gas is then introduced into an absorber, where it interacts with a weak nitric acid solution and fresh water, resulting in a series of over 38 chemical reactions. Generally, NO₂ is absorbed into the aqueous phase and nitric acid is formed. As a result, however, NO and a much smaller fraction of the NO₂ are released back into the gas phase. Since NO is

produced in each reaction that makes nitric acid, extra air is introduced into the absorber to convert the NO back to NO₂. The NO₂ is reabsorbed and the cycle repeats itself. Since NO does not appreciably absorb into the aqueous phase, some NO ultimately exits the top of the column. A smaller fraction of NO₂ also exits the column due to the kinetics and equilibrium of the reactions. The gas exiting the absorption column is called tail gas. At this point, most of the gas is again NO. The tail gas is heated and directed through an air pollution control device to control NO_x emissions to the atmosphere. The hot, pressurized tail gas is then sent through an expander to generate power for the air compressor, and finally exits out the stack.

The NO and NO₂, or NO_x released from nitric acid plants is *originally formed as a product of NH₃ combustion*. However, nitric acid plants also produce NO_x from N₂O₄ in an aqueous reaction. Because it is impossible to determine which NO_x emissions result from combustion as opposed to non-combustion processes, all NO_x emissions from nitric acid plants qualify for this NO and NO₂ administrative reporting exemption because all NO and NO₂ released from nitric acid plants originates from combustion activities.

Similarly, where nitric acid is used in the Adipic Acid manufacturing process, there may be releases of NO_x from control devices in an upstream process. To the extent that those control devices are functioning properly and operate as combustion devices, the resulting NO and NO₂ emissions would be covered under this administrative reporting exemption.

Releases of NO and NO₂ from storage tanks are not intended to be administratively exempt from CERCLA and EPCRA notification requirements because there is a higher likelihood that there would be a response to such a release scenario.

F. Interpretation of CERCLA Provisions

Nine commenters provided comment on the interpretation of certain CERCLA provisions.

1. Proposed Exemption Only Applies to Emissions Not Considered Federally Permitted

One commenter requested that EPA clarify that Federally permitted releases are already exempt from reporting under CERCLA section 101(10)(H) and that the 1,000 pound limit applies only to emissions that are not considered Federally permitted releases. We agree with the commenter that the administrative reporting exemption

described in this rule applies to those releases that are not otherwise covered by CERCLA or EPCRA exemptions, including those covered by Federal permits defined under CERCLA section 101(10)(H).

2. Clarify that NO_x Represents NO and NO₂ Interchangeably

One commenter recommended that EPA clarify in the rule that the terms NO and NO₂ are interchangeable with the term NO_x. Nitrogen oxide (NO) is a CERCLA hazardous substance with an RQ of 10 pounds per 24 hours. Nitrogen dioxide (NO₂) is also a CERCLA hazardous substance with an RQ of 10 pounds per 24 hours. During combustion and combustion-related activities, NO will quickly form NO₂. The term NO_x was used in the proposed rule and this final rule as short-hand for NO and NO₂. For the purpose of reporting, and the administrative reporting exemption, NO and NO₂ are and continue to be treated as individual hazardous substances. This final rule clarifies that point.

G. Issues Related to Rulemaking Procedure

One commenter requested that EPA conform the preamble to the rules actually proposed to make clear that the administrative reporting exemption affords a 1,000 pound exemption to nitrogen oxide and another 1,000 pound exemption to nitrogen dioxide. The commenter is correct that the administrative reporting exemption affords a 1,000 pound exemption to nitrogen oxide and another 1,000 pound exemption to nitrogen dioxide. The preamble to this final rule has clarified this point.

III. Regulatory Analysis

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action.” It has been determined that this rule is a “significant regulatory action” because it raises novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EPA 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action. OMB had no comments on this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This rule represents a reduction in the burden for both industry and the government by administratively exempting the notification requirements for releases of less than 1,000 pounds of NO to the air in 24-hours and less than 1,000 pounds of NO₂ to the air in 24-hours that are the result of combustion and combustion-related activities. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations 40 CFR 302 and 40 CFR 355 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and has assigned OMB control number 2050-0046, EPA ICR number 1049.10 and OMB control number 2050-0086, EPA ICR number 1445.06. A copy of the OMB approved Information Collection Requests (ICRs) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566-1672.

The proposed rule estimated that the annual reporting and recordkeeping burdens associated with the information collected for the episodic release of oil and all hazardous substances (1049.10) to be reduced by approximately 5,449 hours. This represented a reduction in the likely number of respondents from 24,082 to 22,753 a reduction of 1,329 reportable releases. For the purpose of this burden analysis, each reportable episodic release equals one respondent. With respect to the information collected for the continuous release reporting regulation (1445.06) for all hazardous substances, the Agency estimated a reduction of 869 hours, a reduction in the likely number of respondents from 3,145 to 3,009, a reduction of 136 respondents. These estimates remain the same for this final rule.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of

information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations is in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I hereby certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on small entities subject to the rule.

This rulemaking will relieve regulatory burden because we propose to eliminate the reporting requirement for certain releases of NO_x to the air. We expect the net reporting and recordkeeping burden associated with

reporting releases of NO_x under CERCLA section 103 and EPCRA section 304 to decrease. This reduction in burden will be realized mostly by small businesses because larger businesses usually operate under Federal permits and therefore qualify for the "Federally permitted release" exemption for reporting under CERCLA. 40 CFR 302.6. We have therefore concluded that this final rule will relieve regulatory burden for all affected small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. The rule imposes no enforceable duty on any State, local or

tribal governments or the private sector; promulgation of this rule will result in a burden reduction in the receipt of notifications of the release of NO_x. EPA has determined that this rule does not include a Federal mandate that may result in expenditures of \$100 million or more for State, local, or tribal governments, in the aggregate, or the private sector in any one year. This is because this final rule imposes no enforceable duty on any State, local, or tribal governments. EPA also has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, as discussed above, the private sector is not expected to incur costs exceeding \$100 million. Thus, this final rule is not subject to the requirements of Sections 202 and 205 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications." "Policies that have Federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This final rule does not have Federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. There are no State and local government bodies that incur direct compliance costs by this rulemaking. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132 and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicited comment on the proposed rule from State and local officials. No States or local governments commented on the proposed rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR

67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This final rule does not have tribal implications, as specified in Executive Order 13175. This rule does not significantly or uniquely affect the communities of Indian tribal governments, nor would it impose substantial direct compliance costs on them. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Risks and Safety Risks

The Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA has determined that the final rule is not subject to Executive Order 13045 because it is not an "economically significant" rule as defined by Executive Order 12866. EPA also expects the rule does not have a disproportionate effect on children's health.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This final rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary

consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This final rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, that includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective 30 days after it is published in the **Federal Register**.

List of Subjects

40 CFR Part 302

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous wastes, Intergovernmental relations, Natural resources, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

40 CFR Part 355

Air pollution control, Chemicals, Disaster assistance, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: September 28, 2006.

Stephen L. Johnson,
Administrator.

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

■ 1. The authority citation for part 302 continues to read as follows:

Authority: 42 U.S.C. 9602, 9603, 9604; 33 U.S.C. 1321 and 1361.

■ 2. Section 302.6 is amended by adding paragraph (e) to read as follows:

§ 302.6 Notification requirements.

* * * * *

(e) The following releases are exempt from the notification requirements of this section:

(1) Releases in amounts less than 1,000 pounds per 24 hours of nitrogen oxide to the air which are the result of combustion and combustion-related activities.

(2) Releases in amounts less than 1,000 pounds per 24 hours of nitrogen dioxide to the air which are the result of combustion and combustion-related activities.

PART 355—EMERGENCY PLANNING AND NOTIFICATION

■ 3. The authority citation for part 355 continues to read as follows:

Authority: 42 U.S.C. 11002, 11004, and 11048.

■ 4. Section 355.40 is amended by adding paragraph (a)(2)(vii) to read as follows:

§ 355.40 Emergency release notification.

(a) * * *

(1) * * *

(2) * * *

(vii) Any release in amounts less than 1,000 pounds per 24 hours of:

(A) Nitrogen oxide (NO) to the air that is the result of combustion and combustion-related activities.

(B) Nitrogen dioxide (NO₂) to the air that is the result of combustion and combustion-related activities.

* * * * *

[FR Doc. E6-16379 Filed 10-3-06; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1310

RIN 0970-AC26

Head Start Program

AGENCY: Administration for Children and Families (ACF), DHHS.

ACTION: Final rule.

SUMMARY: This rule finalizes the provisions of the proposed rule published on May 30, 2006 and responds to public comments received as a result of the proposed rule. This final rule authorizes approval of annual waivers, under certain circumstances, from two provisions in the current Head Start transportation regulation (45 CFR part 1310): the requirement that each child be seated in a child restraint system while the vehicle is in motion, and the requirement that each bus have at least one bus monitor on board at all times. Waivers would be granted when the Head Start or Early Head Start grantee demonstrates that compliance with the requirement(s) for which the waiver is being sought will result in a significant disruption to the Head Start program or the Early Head Start program and that waiving the requirement(s) is in the best interest of the children involved. The rule also revises the definition of child restraint system in the regulation to remove the reference to weight which now conflicts with Federal Motor Vehicle Safety Standards.

The regulation also reflects new effective dates for Sec. 1310.12(a) and 1310.22(a) on the required use of school buses or allowable alternate vehicles and the required availability of such vehicles adapted for use of children with disabilities, as the result of enactment of Section 224 of Public Law 109-149 and Section 7012 of Public Law 109-234.

DATES: These rules are effective November 3, 2006, except sections 1310.12(a) and 1310.22(a) will become effective on December 30, 2006.

FOR FURTHER INFORMATION CONTACT: Office of Head Start, (202) 205-8572. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 between 8 a.m. and 7 p.m. eastern time.

SUPPLEMENTARY INFORMATION: On December 30, 2005, the President signed Public Law 109-149 that included in Section 223 a provision that authorizes the Secretary of Health and Human Services to waive the requirements of regulations promulgated under the Head Start Act (42 U.S.C. 9831 *et seq.*) pertaining to child restraint systems or vehicle monitors if the Head Start or Early Head Start agency can demonstrate that compliance with such requirements will result in a significant disruption to the program and that waiving the requirement is in the best interest of the children involved. This waiver authority extends until September 30, 2006, or the date of the

enactment of a statute that authorizes appropriations for fiscal year 2006 to carry out the Head Start Act, whichever date is earlier. These rules extend that limited waiver authority indefinitely.

The rules also provide a definition of child restraint system in the Head Start regulations and codify in Head Start regulations the requirement for use of child restraint systems to reflect current National Highway Traffic Safety Administration (NHTSA) regulations with flexibility to address any future changes in the weight range covered by the NHTSA regulation. NHTSA is the agency responsible for issuing Federal Motor Vehicle Safety Standards.

Finally, this rule removes provisions added to section 1310.11(b) and 1310.15(c) that are no longer necessary.

Summary Description of Regulatory Provisions and Response to Comments

Section 1310.2—Waiver Authority and Effective Dates

The regulation provides that effective November 1, 2006, “good cause” for a waiver would exist when adherence to a requirement of the Head Start transportation regulation would create a safety hazard in the circumstances faced by the agency, or when compliance with requirements related to child restraint systems (Secs. 1310.11 and 1310.15(a)) or the use of bus monitors (Sec. 1310.15(c)) would result in a significant disruption to the program and the grantee can demonstrate that waiving such requirements would be in the best interest of the children involved. We are using the November 1, 2006 effective date in recognition that the rule will not be effective until 30 days from the date of publication. In concert with this change, we also have added language under this section to ensure there is no gap in waivers between October 1, 2006 and November 1, 2006. That language provides that the responsible HHS official has authority to grant waivers related to child restraint systems or bus monitors that are retroactive to October 1, 2006, during the period from November 1, 2006 to October 30, 2007.

The regulation also provides that the effective date of Sec. 1310.12(a) and 1310.22(a) is December 30, 2006, reflecting enactment of section 224 of Public Law 109-149, which provides Sec. 1310.12(a) of title 45 of the Code of Federal Regulations (October 1, 2004) shall not be effective until June 30, 2006, or 60 days after the date of the enactment of a statute that authorizes appropriations for fiscal year 2006 to carry out the Head Start Act, whichever date is earlier and subsequent enactment of Section 7021 of Public